In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-95

JOSEPH SATKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied due process because there were inaccuracies in the presentence report and that the sentence imposed (which concededly was within statutory limits) was excessive.

Petitioner pleaded guilty in the United States District Court for the District of New Jersey to five counts of a 40-count indictment charging that he submitted false documents to the Federal Housing Administration (FHA), in violation of 18 U.S.C. 1010 (A. 80a-94a, 97a).[1] The indictment alleged a scheme pursuant to which petitioner bought houses and resold them at substantially higher prices after arranging FHA-insured mortgages

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[1] "A." refers to the appendix to petitioner's brief in the court of appeals, a copy of which is being lodged herewith.

for the purchasers through the use of false "gift" letters.[2] Each of the five counts involved a particular house and buyer. On November 17, 1972, petitioner was fined $5,000 and sentenced to two years' imprisonment on each count, the prison sentences on two counts to be consecutive and those on the other three to run concurrently with one another and with the first two, or a total of four years (A. 75a-76a, 95a). On appeal, petitioner challenged the validity of the sentence on the ground *inter alia* that it was tainted by inaccuracies in the presentence investigative report and a supplement thereto. The court of appeals affirmed (Pet. App. 1a-2a).

1. Petitioner appeared before the district court for sentencing on November 10, 1972 (A. 1a-33a). Following pleas by his two attorneys for leniency, during which numerous supporting exhibits were received (A. 6a-32a; Pet. 3-6), the court granted a request by the attorneys that they be permitted to read a presentence report that had been prepared by the probation department and postponed sentencing for a week to enable the court to review the exhibits and the attorneys to consider the report (A. 32a-33a). During the ensuing week a supplemental presentence report, to which the attorneys were also given access, was submitted (A. 36a-37a).

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[2] Petitioner would tell the prospective buyer that no down payment was necessary, though in fact the FHA required such a payment as a condition of insuring a mortgage. He would then cause a false letter to be submitted to the FHA indicating that the prospective buyer had received a gift of funds sufficient to enable him to make the required payment. In reliance on the letter, the FHA would commit itself to insure a mortgage on the house, which was then sold to the buyer without his having made the minimum investment in the property required by the FHA (A. 80a-94a).

When, on November 17, the proceedings were resumed, the attorneys stated to the court that the report and its supplement contained inaccuracies and misleading statements about petitioner, which they were permitted to point out in detail to the court (A. 39a-61a; Pet. 6-8).[3] Following the attorneys' presentation, during which they were given practically unlimited latitude in countering the allegedly misleading portrayal of petitioner contained in the reports,[4] they and petitioner announced that they were ready for sentencing and the aforementioned sentence was then imposed (A. 74a-76a).[5]

2. There is no merit to petitioner's contention that he was denied due process because of the alleged inac-

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[3] For example, whereas petitioner was said in the reports (concededly accurately) to have made a gross profit of $157,000 on the purchase and resale of twelve certain houses, the attorneys noted that his net profit on the transactions had amounted to only $45,000 (A. 25a-26a, 48a-49a, 57a-58a). Again, whereas the reports indicated that petitioner had made only cosmetic repairs of the properties before reselling them, the attorneys pointed out that in fact petitioner had made substantial and expensive improvements (A. 44a, 46a-49a, 52a-61a, 65a, 69a-70a). The court advised the attorneys before sentencing that it was satisfied from their presentation that petitioner had spent substantial sums repairing the houses and that it would take the fact into account in mitigation (A. 71a, 73a-74a).

[4] The court in its discretion denied a defense request for leave to present testimony by persons present at the hearing attesting to petitioner's good character and reputation in the community (A. 61a-62a, 73a). However, the court received written statements so attesting (A. 62a-65a) and advised counsel that in imposing sentence it would consider his character and reputation to be good (A. 73a).

[5] Twice during the proceedings the court had advised that petitioner was free to withdraw his plea of guilty if he wished to, but counsel declined the court's offers (A. 7a-8a, 59a-60a).

curies and misleading statements concerning him in the presentence report and its supplement (Pet. 2, 9-11). As the court of appeals noted, petitioner and his attorneys were given full access to the reports and a full opportunity to refute the disputed matters (Pet. App. 2a). Fairness required no more. Indeed, petitioner was granted greater consideration than he was entitled to, since it was discretionary with the court whether to permit the defense to see the reports at all. Fed R. Crim. P. 32(c)(2); *Gregg* v. *United States*, 394 U.S. 489, 492; *Manley* v. *United States*, 432 F. 2d 1241, 1245 (C.A. 2). *Townsend* v. *Burke*, 334 U.S. 736, relied on by petitioner, is inapposite. That case involved an uncounseled defendant who had been sentenced on the basis of materially untrue assumptions concerning his criminal record. Not only was petitioner here effectively represented at the proceedings but, as noted, his attorneys were given every opportunity to refute the mis-statements they believed were contained in the reports.

3. Petitioner contends that his four-year prison sentence, which he concedes was within the statutory limits,[6] was unreasonably harsh and that the court of appeals erred in refusing to review it for excessiveness (Pet. 2, 13-14). This Court has held, however, that a federal sentence that is within statutorily prescribed limits is not subject to appellate review or revision. *Gore* v. *United States*, 357 U.S. 386, 393; *Blockburger* v. *United States*, 284 U.S. 299, 305; cf. *United States* v. *Tucker*,

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[6] Petitioner was subject to a ten-year maximum sentence (two years on each of the five counts to which he pleaded guilty) (18 U.S.C. 1010).

404 U.S. 443, 447.[7] In *United States* v. *McKinney*, 427 F. 2d 449 (C.A. 6), and *United States* v. *Wiley*, 278 F. 2d 500 (C.A. 7), cited by petitioner, criminal causes were remanded for resentencing in light of expressed views by the reviewing courts that the sentences imposed had been too severe. But even if it be assumed *arguendo* that a reviewing court has the authority in a proper case to do this, it is in any event clear that the taking of such action would be highly discretionary. Petitioner makes no showing that such action was called for in this case.[8]

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[7] See also, *e.g.*, *United States* v. *Hodges*, 436 F. 2d 676, 678-679 (C.A. 10), certiorari denied, 403 U.S. 908; *Smith* v. *United States*, 407 F. 2d 356, 359 (C.A. 8), certiorari denied, 395 U.S. 966; *Smith* v. *United States*, 273 F. 2d 462, 467-468 (C.A. 10), certiorari denied, 363 U.S. 846; *United States* v. *Rosenberg*, 195 F. 2d 583, 604-607 (C.A. 2), certiorari denied, 344 U.S. 838. *Yates* v. *United States*, 356 U.S. 363, and *United States* v. *United Mine Workers*, 330 U.S. 258, in which this Court reduced criminal contempt sentences, are distinguishable in that there is no legislatively fixed sentence for contempt.

[8] Petitioner's contention that his sentencing violated the modern penological ideal of making the punishment fit the offender as well as the crime (Pet. 2, 11-12)—that the district court, in other words, failed to exercise proper discretion in selecting the penalty to be imposed in light of petitioner's individual circumstances (cf. *United States* v. *Daniels*, 446 F. 2d 967 (C.A. 6); *United States* v. *McCoy*, 429 F. 2d 739, 743-744 (C.A. D.C.))—is based on the fact that petitioner was erroneously referred to in the principal presentence report as a codefendant of persons who had shortly earlier been sentenced for similar FHA-related frauds and the fact that the presentence reports in all the cases apparently contained a common passage describing the "'details of the offense'" (Pet. 3, 6, 7, 11-12). It is a sufficient answer to the contention to note that the reports were not prepared by the court and that in any event the alleged misreference to petitioner as a codefendant, and all the related facts, were thoroughly aired at petitioner's presentence hearing (A. 2a-7a, 39a-44a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.